Supreme Court, U.S.
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No. 95-780

In The

Supreme Court of the United States

October Term, 1995

MAHESH K. SINGH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court, Appellate Division Second Department, State Of New York

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a presumption of vindictiveness arise where a sentencing judge imposes a sentence three to nine times greater than that recommended by the prosecutor following a defendant's rejection of a plea bargain and the election to exercise the right of trial by jury?

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the judgment of the Supreme Court, Appellate Division, Second Department, State of New York, entered March 20, 1995 in People of the State of New York v. Mahesh K. Singh.

JURISDICTION

Petitioner seeks a writ of certiorari pursuant to 28 U.S.C.A. §1257. Respectfully, we maintain that the question presented was not raised and preserved for review thus the New York State Court of Appeals did not pass on the question presented and, therefore, 28 U.S.C.A. §1257 may not properly be invoked.

REASONS FOR DENYING THE WRIT

Pursuant to United States Supreme Court Rule 15, subd. 1, 28 U.S.C.A., respondent is obliged to point out "perceived misstatements of fact and law set forth in the petition which have bearing on the question of what issues would properly be before the Court if certiorari were granted." Consistent with this obligation, respondent observes that:

(1) Petitioner misstated the procedural history of the New York State Court of Appeals consideration of the question "whether the cruel and unusual punishment

provisions of the United States and New York Constitutions are violated when a sentencing judge rejects the People's sentencing recommendation and instead imposes a greater sentence, for no reason other than the defendant elected to stand trial before a jury?" (Application for Reconsideration of Denial of Leave to Appeal, dated May 4, 1995, at pp. 2-3);

(2) Petitioner misstated the constitutional argument presented to the New York State Court as petitioner urged to the Court of Appeals solely a violation of the New York State and United States Constitutional protection against "cruel and unusual punishment (U.S. Constitution 8th Amendment; N.Y. Constitution Art. 1, sec. 5)" (Application for Reconsideration of Denial of Leave to Appeal, dated May 4, 1995, at p. 9). Thus, although petitioner presently claims that:

> "The issue of the excessiveness of the sentence was set forth in the application for a certificate granting leave to appeal made to the Court of Appeals of the State of New York and also in the application for reconsideration of that tribunal's denial of leave to appeal" (Petition for a Writ of Certiorari at p. 4-5),

no issue regarding petitioner's sentence was raised in either of the first two letters submitted to the Honorable Vito J. Titone, Associate Judge, Court of Appeals. The letters submitted, the initial one dated March 27, 1995, and the latter seeking to supplement the initial application, dated April 17, 1995, do not raise any issue regarding petitioner's sentence. In fact, in his final reconsideration application, petitioner noted, at page 2:

> "It should be noted that the issue regarding cruel and unusual punishment was not posed in previous submissions to Judge Titone. However, the issue of illegal sentence clearly was presented in the brief filed by appellants with the Appellate Division" (Application for Reconsideration of Denial of Leave to Appeal, dated May 4, 1995).

Clearly then, the only time petitioner raised any issue concerning his sentence in the Court of Appeals was in his final reconsideration application, dated May 4, 1995, and, as previously discussed, the constitutional provision petitioner claimed was implicated was not the Fourteenth Amendment of the Constitution of the United States, as presently urged in the Petition for a Writ of Certiorari at page 2, but the Eighth Amendment of the New York and United States Constitutions;

(3) Petitioner inappropriately urged that there is significance to the denial of leave to appeal by the Court of Appeals. The assertion by petitioner in his Petition for a Writ of Certiorari, at page 8, that

> "with the Patterson holding arising from its own Department, the irresistible conclusion is that the Appellate Division in the instant case either misapplied the holding of this Court in *North Carolina v. Pearce* or felt that the facts of Mahesh K. Singh's matter significantly differed in quality from those presented in Patterson, *supra. The latter conclusion is fortified by the fact that the Court of Appeals declined twice to grant review of this case, first in its certificate denying leave, which was later rescinded on technical grounds, and again following petitioner's application for reconsideration. While it is understood that such declination is not*

> *evidence of any substantive determination, nonetheless, the significance cannot be overlooked, and the need for the guiding hand of this Court becomes all the more compelling"* (emphasis supplied),

is thus plainly erroneous as the sentencing issue was only presented in petitioner's very last submission to the court. Accordingly, absolutely no significance can attach to the fact that several applications were made and denied when only the last contained any issue concerning petitioner's sentence.

Additionally, petitioner argues, contrary to well-established New York law that denial of leave to appeal is not authority for any proposition of law (*Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284 (1929); *Calandra v. Rothwax*, 65 N.Y.2d 897 (1985)], that there is some significance to the Court of Appeals "declination" to grant leave to appeal;

(4) Finally, petitioner wholly ignored this Court's review of the "presumption of vindictiveness" in *Alabama v. Smith* 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989) in claiming in his Petition for a Writ of Certiorari, at page 5, that "it has been more than 25 years since this Court addressed the issue of the presumption of vindictiveness in *Pearce*."

In addition to the above perceived misstatements of fact or law, we urge that petitioner has misapprehended the guiding principles of this Court in seeking a writ of certiorari to review whether a presumption of vindictiveness arises in circumstances where there has been no successful appeal and ultimate resentence.

Petitioner's reliance on *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) is wholly misplaced. Petitioner ignores the significance of the fact that Pearce had been subjected to a longer sentence after his *successful appeal* and retrial. As this Court specifically observed in *Alabama v. Smith, supra*, 109 S.Ct. at 2204-2205:

> "While the *Pearce* opinion appeared on its face to announce a rule of sweeping dimension, our subsequent cases have made clear that its presumption of vindictiveness 'do[es] not apply in every case where a convicted defendant receives a higher sentence on retrial.' *Texas v. McCullough*, 475 U.S., at 138, 106 S.Ct., at 979. As we explained in *Texas v. McCullough*, 'the evil the [*Pearce*] Court sought to prevent' was not the imposition of 'enlarged sentences after a new trial' but 'vindictiveness of a sentencing judge.' *Ibid.* See also *Chaffin v. Stynchcombe*, 412 U.S. 17, 25, 93 S.Ct. 1977, 1982, 36 L.Ed.2d 714 (1973) (the *Pearce* presumption was not designed to prevent the imposition of an increased sentence on retrial 'for some valid reason associated with the need for flexibility and discretion in the sentencing process.' but was 'premised on the apparent need to guard against *vindictiveness* in the resentencing process'). Because the *Pearce* presumption 'may operate in the absence of any proof of an improper motive and thus . . . block a legitimate response to criminal conduct.' *United States v. Goodwin, supra*, 457 U.S., at 373, 102 S.Ct., at 2488, we have limited its application, like that of 'other "judicially created means of effectuating the rights secured by the [Constitution]," ' to circumstances 'where its "objectives" are thought most efficaciously served."' *Texas v.*

> *McCullough, supra,* 475 U.S., at 138, 106 S.Ct, at 979, quoting *Stone v. Powell,* 428 U.S. 465, 482, 487, 96 S.Ct. 3037, 3046, 3049, 49 L.Ed.2d 1067 (1976). Such circumstances are those in which there is a 'reasonable likelihood,' *United States v. Goodwin, supra,* 457 U.S., at 373, 102 S.Ct., at 2488, that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority. Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness, see *Wasman v. United States,* 468 U.S. 559, 569, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984)."

Thus, in *Alabama v. Smith, supra,* where the petitioner was successful on his *appeal* from his prior guilty *plea* and a longer sentence after *trial* on the original charges was imposed, this Court found that since there was no "reasonable likelihood" that the judge was motivated by vindictiveness and that, therefore, there was no basis for application of the presumption of vindictiveness, petitioner must bear the burden of proving *actual vindictiveness* on the part of the trial judge.

Therefore, petitioner here, falling within the general rule, must prove actual vindictiveness, as the rebuttable presumption of vindictiveness on the part of the sentencing judge applies *only* in circumstances where, upon a retrial after a *prior trial,* a greater sentence is imposed. *Wasman v. United States,* 468 U.S. 559, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984).

Petitioner has wholly ignored this Court's decision in *Corbitt v. New Jersey,* 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978) in which this Court, consistent with its prior approval of the plea bargaining process, held that the

New Jersey sentencing scheme which conferred substantial leniency upon a defendant who pleaded guilty of homicide and mandated life imprisonment for those who were convicted after trial did not violate the 14th Amendment right to equal protection. Thus, *supra*, 99 S.Ct. at 500-501, the Court held:

> "Appellant also argues that the sentencing scheme infringes his right to equal protection under the Fourteenth Amendment because it penalizes the exercise of a "fundamental right." We rejected a similar argument in *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), noting that "[t]o fit the problem . . . into an equal protection framework is a task too Procrustean to be rationally accomplished". Id., at 723, 89 S.Ct., at 2079. All New Jersey defendants are given the same choice. Those electing to contest their guilt face a certainty of life imprisonment if convicted of first-degree murder; but they may be acquitted instead or, in a proper case, may be convicted of a lesser degree of homicide and receive a sentence of less than life. Furthermore, a plea of non vult may itself result in a life sentence. The result therefore,
>
> > "may depend upon a particular combination of infinite variables peculiar to each individual trial. It simply cannot be said that a state has invidiously 'classified'. . . . " Id., at 722, 89 S. Ct., at 2079.
>
> It cannot be said that defendants found guilty by a jury are "penalized" for exercising the right to a jury trial any more than defendants who plead guilty are penalized because they give up the chance of acquittal at trial. In each instance,

> the defendant faces a multitude of possible outcomes and freely makes his choice. Equal protection does not free those who made a bad assessment of risks or a bad choice from the consequences of their decision.";

Clearly then, there is no question presented upon which a writ of certiorari ought to be granted since this Court has resolved the issue consistent with its position articulated in *Corbitt v. New Jersey, supra.*

Finally, we urge that on the record below, actual vindictiveness is not demonstrated. We note that petitioner himself has categorized his argument as resting on *implication,* as he urged that the trial judge had only "impliedly admit[ted]" to the imposition of the greater sentence as a result of the choice to stand trial (Application for Reconsideration of Denial of Leave to Appeal, dated May 4, 1995, at p. 10).

We maintain, as we did in opposing petitioner's application for reconsideration, by letter dated May 9, 1995:

> "Additionally, the court did not impermissibly punish appellant Singh for standing trial. A plain reading of the minutes reveals that, although somewhat inartfully stated, the trial court explained that although the State may confer substantial benefit on a defendant who chooses to spare the State a trial and thus sentence the defendant on a negotiated plea to *less* punishment than otherwise would be appropriate under the facts, that after trial, the court, now fully informed of the defendant's guilty actions, will impose the full punishment merited by those actions."

Additionally, the trial court, cognizant of petitioner's *denial of any guilt in his sworn trial testimony* was constitutionally permitted to consider that petitioner's position at sentencing was, in essence, one in which he now *admitted guilt* and sought the leniency which would have been extended as a benefit of a plea, which demonstrated that he had been untruthful in his trial testimony. *Alabama v. Smith, supra,* 109 S.Ct. at 2206; *United States v. Grayson,* 438 U.S. 41, 53, 98 S.Ct. 2610, 2617, 57 L.Ed. 582 (1978).

Therefore, we respectfully urge that, on the record presented, there is no question raised by petitioner which requires resolution by this Court.

CONCLUSION

FOR THE FOREGOING REASONS, THE QUESTION PRESENTED SHOULD BE ANSWERED IN THE NEGATIVE AND THE PETITION SHOULD BE DENIED IN ALL RESPECTS.

DATED: Riverhead, New York
December 12, 1995

Respectfully submitted,

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